No. 95-7452

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, Superintendent,
Mayo Correctional Institution,
Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
U. S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondent modifies the Questions presented by Petitioner as follows:

I. Does the *Ex Post Facto* Clause forbid a state to cancel a prisoner's previously granted early release credits and nondiscretionary early release date established solely to address prison overcrowding through the retroactive application of offense-based exclusions from eligibility?

II. Does a state legislature deprive a prisoner of liberty without due process of law by retroactively cancelling lawfully granted early-release credits and a lawfully established early-release dated established solely through a mechanism for controlling prison overcrowding without providing adjudicatory procedures, when the overcrowding crisis ceases to exist?[1]

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[1] Respondent notes that although this is second question is contained in the Questions Presented For Review by the Petitioner, no substantial argument was made in the petition.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10 provides in pertinent part:

> Section 10. No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .

* * *

United States Constitution, Amendment XIV, § 1, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The relevant Florida statutes are codified as:

Florida Statutes Section 944.276, 1987

Florida Statutes Section 944.277, Supp. 1988 and Supp. 1992

Florida Statutes Section 944.598, Supp. 1986

[These statutes have been reprinted in full in the appendix to Petitioner's brief.]

STATEMENT OF THE CASE

I. Historical Background of Florida's Overcrowding Statutes

Since 1983, the State of Florida has enacted a series of early release statutes specifically and solely designed to alleviate an overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Florida Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. *See Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976).

The first early release statute (Florida Statutes Section 944.598), enacted in 1983 and repealed in 1993, provided for the mandatory grant of emergency gaintime to all inmates within the prison system if the threshold of 99% of lawful capacity was reached. This statute was never implemented. Later overcrowding statutes administered by the Florida Department of Corrections (Florida Statutes Sections 944.276 and 944.277), enacted in 1987 and 1988, respectively, provided for the discretionary grant of credits to all inmates who met the criteria for such awards and who were not otherwise excluded by the statutes. The threshold levels required to trigger awards under these later statutes were below the 99% level of the original emergency release statute.

As the overcrowding crisis began to subside and in light of the grave concern for public safety, the Florida Legislature

commenced to narrow the categories of prisoners eligible for overcrowding release and various exclusions were added to the statutes. Prisoners convicted of murder offenses were not initially among the excluded classes under any of the overcrowding statutes. However, in 1990, the Florida Legislature removed from eligibility for early release for overcrowding any prisoner convicted of a murder offense. § 944.277(1)(i), Fla. Stat. (Supp. 1990). Simultaneously, the Florida Legislature enacted a new overcrowding mechanism which would transfer the responsibility for review and release of prisoners because of prison overcrowding from the Florida Department of Corrections to the Florida Parole Commission.[2] § 947.146, Fla. Stat. (1989). Like the overcrowding mechanisms previously administered by the Department, the control release statute administered by the Commission contained specific exclusions from eligibility for early release because of

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[2] The primary reason for this transfer of responsibility was to allow for greater review of the individual prior to release because of prison overcrowding. In light of the Florida Parole Commission's expertise in parole reviews, the Florida Legislature determined that the Commission was in a better position to make release determinations in the interests of public safety as its staffing and function were designed specifically for that purpose. The overcrowding statutes administered by the Department of Corrections did not provide for individual review because the department was not structured to accomplish such reviews in a time frame that would allow releases sufficient to control prison overcrowding. To overcome the inability to conduct individualized reviews, the legislature included a built-in behavior indicator in the statute -- overcrowding credits could only be allocated to an otherwise eligible inmate if that inmate was also "earning incentive gain-time" This statutory restriction was not designed as an prison management or rehabilitative tool. Nor was this restriction intended as a reward to inmates for good behavior. It was simply a risk-assessment mechanism in furtherance of public safety concerns to assure that inmates with consistently unsatisfactory behavior would not be released early.

overcrowding.

As other measures, such as front-end diversionary programs and the building of additional prison beds, continued to reduce overcrowding concerns, the Florida Legislature systematically narrowed the pool of inmates eligible for very early release due to prison overcrowding. The legislature's efforts culminated in the retroactive cancellation in 1992 of early release credits for some groups of violent offenders, such as Mr. Lynce,[3] and ultimately, with the enactment of Florida's Safe Streets Act in June 1993,[4] the retroactive cancellation of all pending early release balances for prisoners in custody as well as those prisoners returned to custody after release on bond, escape, or revocation of supervision.

Florida has not made any releases because of prison overcrowding since December 1994.

II. Statement of The Case

Respondent accepts the Petitioner's rendition of the case and facts.

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[3] See § 944.277(1)(h),(i), Fla. Stat. (Supp. 1992); 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[4] See Ch. 93-406, Laws of Fla., codified, in part, at Florida Statutes Section 944.278.

REASONS FOR DENYING THE WRIT

I. The Judgement of the Court of Appeals In *Lynce* Is Consistent With *Collins* And *Morales* And Is Distinguishable From *Weaver*

Petitioner Lynce seeks to liken the early release due to prison overcrowding to satisfaction of sentence and release due to the application of goodtime/gaintime earned by a prisoner. The allocation of overcrowding credits (provisional credits), a mechanism legislated solely for the purpose of controlling prison overcrowding, is not goodtime/gaintime to be earned by a prisoner. None of Florida's early release mechanisms for overcrowding were designed to foster rehabilitation, provide a prison management tool, or inure as a benefit or reward to a prisoner for good behavior in prison. Both the Florida Supreme Court and the Eleventh Circuit clearly recognized this very important factor in their decisions addressing Florida's early release statutes. Both courts specifically distinguished the cases dealing with early release due to prison overcrowding from those addressing basic and incentive gaintime. In *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), Florida's highest court noted in addressing the provisional credits statute:

> In *Dugger v. Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), this Court held that the state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no

> sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain. As a result we held that provisional credits are not subject to the prohibition against ex post facto laws. *Id.*

Griffin, 638 So. 2d at 501, citing *Dugger* v. *Rodrick*, 584 So. 2d at 4.

Similarly, in a very recent decision, still pending a petition for rehearing when this Court rendered its decision in *Cal. Dept. of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), the Eleventh Circuit followed the *Griffin* rationale in addressing a later overcrowding mechanism, control release:

> The control release statute is quite different. It reduces an inmate's imprisonment automatically for the convenience of the Department of Corrections. The statute is procedural, not substantive like "good-time" gain time, and therefore is not ex post facto. *Rodrick*, 584 So. 2d at 4.
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> Additionally, the retroactive application of control release does not actually disadvantage the petitioner by reducing his opportunity to shorten his time in prison. Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced.

Hock, 41 F.3d 1470, 1472 (11th Cir. 1995).

Both the Florida Supreme Court and the Eleventh Circuit analyzed the substance of Florida's early release statutes, not just the obvious effect. In so doing, the these courts recognized the very important fact that Florida's early release statutes merely provide procedural mechanisms to the executive bodies administering them to achieve the singular goal of controlling prison overcrowding. Mr. Lynce claims that the decision below is

irreconcilable with the holdings in *Weaver* and *Greenfield*. Petition at 7. On the contrary, the decision of the Eleventh Circuit is distinguishable from *Weaver v. Graham*, 450 U.S. 24 (1981). In *Weaver*, this Court considered the effect of a Florida statute which reduced the amount of automatic or basic gaintime applied to a prisoner's sentence upon incarceration.[5] Under the earlier 5-10-15 formula for award of automatic gaintime, a sentence of 10 years was automatically reduced to a sentence of approximately 6 years upon incarceration. Under the formula enacted in 1978 providing for a reduced formula of 3-6-9, a sentence of 10 years was only reduced to 8 years. Thus, the retroactive application of the later formula resulted in an increase in the lower end of the possible sentence range. Because the automatic gaintime was truly a determinant of the actual sentence imposed, the alteration of this determinant in a fashion that increased the initial penalty imposed ran afoul of the *Ex Post Facto* Clause.

Florida's early release mechanisms do not produce this same effect. There is no automatic reduction of sentence upon

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[5] The statutes in effect in 1976 that were considered in *Weaver* provided for automatic deductions from a prisoner's sentence of 5 days per month off the first and second years, 10 days per month off the third and fourth years, and 15 days per month off the fifth and all succeeding years. § 944.27(1), Fla. Stat. (1975). In 1978, the Florida legislature repealed the previous gaintime statute and enacted a new formula for automatic deductions of 3 days per month off the first and second years, 6 days per month off the third and fourth years, and 9 days per month off the fifth and all succeeding years. § 944.275(1), Fla. Stat. (1979). These deductions automatically were applied upon incarceration as a lump-sum deduction from sentence. *See Knuck v. Wainwright*, 759 F.2d 856 (11th Cir. 1985).

incarceration. There is no relationship between original length of sentence and the allocation of overcrowding credits. There is no predictability as to when or how many overcrowding credits would need to be allocated. Indeed on the date a prisoner committed his crime, there was no assurance that overcrowding would still be in effect on the date of incarceration. Thus, the actual penalty for the crime imposed was never altered by the allocation of overcrowding credits. A 10-year sentence on the date of incarceration was still a 10-year sentence.

In *Collins* v. *Youngblood*, 497 U.S. 37 (1990) and *Cal. Dept. of Corrections* v. *Morales*, 514 U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), this Court has made clear that "the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's '*opportunity* to take advantage of provisions for early release,' (citation omitted), but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 U.S.___, 131 L.Ed.2d at 595, n.3. In both *Collins* and *Morales*, the Court has emphasized that it is the "increase in the penalty by which a crime is punishable" which triggers the *ex post facto* prohibitions not just any potential disadvantage occasioned by a prisoner or change that results in an alteration of the actual length of confinement. The State of Florida did not change its mind as to the overall terms of imprisonment it believed appropriate as punishment for Petitioner Lynce's crimes. It simply

was faced with addressing an independent and somewhat unpredictable problem of overcrowding -- the fact that the Legislature devised various mechanisms to allow releases to control prison overcrowding did not in any way alter the punishment Petitioner was destined to receive on the date he committed his crime. Mr. Lynce had no way of knowing what the future might hold with regard to prison overcrowding and his potential to receive a very early release as a result. Neither the State of Florida nor the sentencing courts altered the punishment range under the state sentencing guidelines based upon prison overcrowding -- overcrowding was a phenomena addressed administratively by the Florida Legislature. Both Florida and the federal courts in this circuit have consistently determined that Florida's overcrowding statutes are remedial, administrative, and procedural statutes designed to address prison overcrowding rather than penal statutes designed to address punishments for crimes. These statutes do not offend the prohibition against ex post facto laws under either the *Collins* or *Morales* tests. The judgment of the Eleventh Circuit in *Lynce* is consistent with present *ex post facto* jurisprudence. No further review is warranted by this Court.

II. The Conflicting Decisions of the Tenth Circuit and A Texas Criminal Appellate Court Are Anomalies That Present No Substantial Conflict For Resolution

Petitioner Lynce urges the Court to grant his petition because the rationale and result of the lower court's disposition directly

conflict with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991) and *Ex Parte Rutledge*, 741 S.W.2d 460 (Tex. Crim. app. 1987)(*en banc*). (Petition at 10.) Mr. Lynce points to a single federal circuit court decision and a single state criminal appellate court decision as providing substantial and sufficient conflict to warrant this Court's resolution. On the contrary, these decisions are anomalies which cannot serve as a basis to review the overwhelmingly consistent decisions in the state and federal courts in this circuit.

The Texas case, *Ex parte Rutledge*, 741 S.W.2d 460 (Tex.Crim.App. 1987) (*en banc*), was decided long before and without benefit of this Court's decisions in *Collins* and *Morales*. Thus, the result in *Rutledge* may well have been different and should not be viewed for purposes of establishing substantial conflict. Unlike *Rutledge*, however, the decision of the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991) was rendered after *Collins*. While the *Lynce* decision is indeed in conflict with the *Arnold* decision of the Tenth Circuit, *Arnold* is erroneously grounded in effect-based analysis of *Weaver v. Graham*, 450 U.S. 24 (1981), *Miller v. Florida*, 483 U.S. 423 (1987), and *Lindsey v. Washington*, 301 U.S. 397 (1937): the focus is on the potential lengthening of incarceration.[6] The *Arnold* court had before it for

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[6] As this Court noted in *Morales*, 514 U.S.___, 115 S.Ct. 1597, 131 L.Ed.2d 588, 595 n.3.,

> Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See

review an appeal from a federal habeas in which the Oklahoma prisoner challenged an amendment to Oklahoma's prison overcrowding statutes which reduced his eligibility for emergency release due to overcrowding. In *Arnold*, the Tenth Circuit relied on an earlier decision of the Oklahoma Court of Criminal Appeals, *Ekstrand v. Oklahoma*, 791 P.2d 92 (Okla.Crim.App.1990) (citing *Weaver*), in which the Oklahoma court addressed whether an amended Oklahoma statute relating to "earned" credits was an *ex post facto* law when its application to prisoners resulted in the computing of fewer earned credits than under the statute before the amendment, thereby lengthening the prisoners' sentences. *Id.* at 93. In *Ekstrand*, "[a]fter comparing the potential for earning credits before and after amendment, the [Oklahoma] court concluded that the amendment was disadvantageous". *Id.* at 94. Based on that factor, and that factor alone, the Oklahoma court declared the amendment in violation of the *ex post facto* clause.

In adopting *Ekstrand*, the Tenth Circuit rejected another decision of the Oklahoma Court of Criminal Appeals, *Barnes v.*

> *Lindsey*, 301 US, at 401, 81 L Ed 1182, 57 S Ct 797; *Weaver*, 450 US, at 29, 67 L Ed 2d 17, 101 S Ct 960; *Miller*, 482 US, at 433, 96 L Ed 2d 351, 107 S Ct 2446. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 US 37, 41, 111 L Ed 2d 30, 110 S Ct 2715 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," see post, at ___, 131 L.Ed. 2d, at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Oklahoma, 791 P.2d 1010 (Okla.Crim.App.1990), in which Oklahoma, like Florida, drew a distinction between credits earned for good behavior, which were the subject of the *Ekstrand* decision and emergency credits meted out to alleviate prison overcrowding. As Florida's courts and the federal district courts in this circuit have recently done, the Oklahoma court concluded that prison overcrowding was unrelated to a prisoner's crime and could not be viewed as a consequence attached to the crime at the time it was committed. As a result, eligibility for emergency release due to overcrowding never ventured into the realm subject to ex post fact analysis. The Tenth Circuit rejected the state court's determination of the nature of emergency overcrowding credits, finding no difference between "earned" credits and "emergency" credits. Such a matter is a determination of state law that should not have been disturbed. When closely analyzed, the *Arnold* court's sole test for whether an *ex post facto* violation occurred was whether Arnold himself was disadvantaged. This factor alone is an incorrect test in assessing an ex post facto challenge. This singular, conflicting decision is founded on an incorrect test and does not provide a compelling basis for this Court to review the overwhelmingly consistent decisions of the state and federal courts within this circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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